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'Climate Change, Displacement and the Role of International Law and Policy'

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A Introduction

An underlying stumbling block in the discourse of climate change-related movement is the inherent difficulty in conceptualizing and accurately describing the phenomenon. For example, is it properly conceived of as a refugee issue, a human rights issue, an environmental issue, a security issue, a migration issue or a humanitarian issue? How it is understood is important, because it determines the development of legal and policy responses.

The extent to which international law and institutions respond to climate-related human movement will depend in part on: (a) whether such movement is perceived as voluntary or involuntary; (b) the nature of the trigger (a disaster versus a slow-onset process); (c) whether international borders are crossed; (d) the extent to which there are political incentives to characterize something as linked to climate change or not; and (e) whether movement is driven or aggravated by human factors, such as discrimination.

International law only recognizes a very small class of forced migrants as people whom other countries have an obligation to protect: 'refugees', 'stateless persons', and those eligible for complementary protection. This means that unless people fall within one of those groups, or can lawfully migrate for reasons such as employment, family and education, they run the risk of interdiction, detention and expulsion if they attempt to cross an international border and have no legal entitlement to stay in that other country.

Although international law carefully defines 'refugees' and others in a particular way, this does not mean that people outside such definitions are not worthy of protection, or necessarily denied it.[1] Definitions serve an instrumental purpose. They are bureaucratic labels that delimit rights

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[1] See eg the discussion of complementary protection below.

and obligations, and that may seek to bolster some kind of ethical claim to protection or assistance as well. Indeed, the creation of a definition inevitably leads to a testing of its boundaries, and sets up the goalposts for re-evaluating and re-defining what it should be. The key point here is that the law does not answer or resolve the fundamental problems of definitional debates; it simply provides a set of criteria from which certain rights and obligations may flow.

B Gaps in refugee law and complementary protection

Refugee law

The term 'refugee' is a legal term of art and in most cases will not assist most people who move on account of climate change impacts. That said, in some cases it will apply and when it does, people of course should be protected as Convention refugees. An example might be if government policies targeted particular groups reliant on agriculture for survival, or used starvation or famine as a political tool.

There are a number of difficulties in applying refugee law to climate-related displacement. First, the refugee definition only applies to people who have already crossed an international border. Much of the anticipated movement in response to climate change will be internal, and thus will not meet this preliminary requirement. Secondly, it is difficult to characterize 'climate change' as 'persecution'. 'Persecution' entails violations of human rights that are sufficiently serious owing to their nature or repetition.[2] It remains very much a question of degree and proportion, and is assessed according to the nature of the right at risk, the nature and severity of the restriction, and the likelihood of the restriction eventuating in the individual case.[3] General claims based on 'climate change' do not meet this persecution mould.

Thirdly, even if it were possible to establish that the impacts of climate change constituted 'persecution', the Refugee Convention poses an additional hurdle for those displaced by climate change: namely, that persecution is *on account of* an individual's race, religion, nationality, political opinion, or membership of a particular social group. The impacts of climate change are largely indiscriminate, rather than tied to particular characteristics. An argument that such people might together constitute a 'particular social group' would be difficult to establish, since to do this the group must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.[4]

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[2] See also Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, art 9. It may include a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: Migration Act 1958 (Cth), s 91R(2) (Australia).

[3] See GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edition, Oxford University Press, Oxford, 2007) 92.

[4] Goodwin-Gill and McAdam, *op cit*, 79–80; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (Dawson J). Note, however, Foster's remark that: 'it is clear that the poor can properly be considered a PSG, such that if being poor makes one vulnerable to persecutory types of harm, whether socio-economic or not, then a refugee claim may be established': Michelle Foster, '*Non-Refoulement* on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' [2009] New Zealand

The two regional refugee instruments (OAU Convention in Africa and the Cartagena Declaration in Latin America) contain broader refugee definitions than the 1951 Convention, including protecting people displaced by 'events seriously disturbing the public order'. It has been argued, that sudden-onset disasters could potentially be characterized in this way,[5] although this would be a considerable extension beyond its accepted scope – public disturbances resulting in violence.[6] It has been regional practice in Africa to provide temporary protection to people who cross an international border to flee a natural disaster (eg Congolese fleeing eruption of Mount Nyiragongo in 2002 and fleeing to Rwanda). However, African governments have never characterized this as an obligation pursuant to the OAU Convention. By contrast to the 1951 Refugee Convention, which assesses the risk of potential future harm, both regional instruments seem to require evidence of an *actual* threat: protection is premised on having already been compelled to leave because of it. Accordingly, they have limited utility as tools for providing pre-emptive protection.

Complementary protection

Climate change will impact on a number of human rights (life, health, food, shelter, self-determination, etc). However, at present only a handful of human rights principles are recognized as giving rise to a protection obligation on the part of a receiving country. Human rights law has expanded countries' protection obligations beyond the 'refugee' category, to include people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This is known in international law as 'complementary protection', because it describes human rights-based protection that is complementary to that provided by the 1951 Refugee Convention.

Since decision makers have traditionally failed to accord the same weight to economic, social and cultural rights as they have to civil and political rights, breaches of socio-economic rights (eg lack of resources, food, healthcare, etc) have often been 're-characterized' as a form of cruel, inhuman or degrading treatment, which gives rise to international protection. However, courts have carefully circumscribed the meaning of 'inhuman or degrading treatment' so that it cannot be used as a remedy for general poverty, unemployment, or lack of resources or medical care except in the most exceptional circumstances.

Currently, it seems unlikely that a lack of basic services alone would substantiate a complementary protection claim, unless this rendered survival – on return – entirely impossible.

Law Review 257, 310 (fn omitted). Even if this test could be met by certain people displaced by climate change, the difficulty would remain in establishing 'persecution' in the context of climate-induced displacement.

[5] Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 African Journal of International and Comparative Law 204, 225–27; Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 88–89; cf James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 16–21, who argues that the definition 'does not ... suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community' (17). See also Michelle Schwartz, 'International Legal Protection for Victims of Environmental Abuse' (1993) 18 Yale Journal of International Law 355, 380.

[6] Kälin, *op cit*, 88.

Something else – a distinguishing feature that makes the lack of such services particularly deleterious on the applicant – would appear to be necessary.

Complementary protection is an inadequate mechanism to respond to pre-emptive movement where conditions are *anticipated* to become dire. It would not assist people trying to move before a situation becomes intolerable. Thus, it will likely take some decades before the deleterious effects of climate change, interacting with underlying socio-economic vulnerabilities, will be seen as constituting a violation giving rise to protection from removal.

Nevertheless, there are signs that in practice, more expansive practices may be developing domestically. For example, in the United Kingdom, the Discretionary Leave policy recognizes that deprivation of the basic means for survival may preclude return under article 3.

C 'Survival migration'

Some people have called for a treaty on climate-related displacement, which necessarily presupposes that this new class of persons can be legally defined. I have critiqued this idea for a number of reasons which I do not have time to go into here. However, it is not yet clear whether a universally applicable definition of those displaced by climate change is necessary or desirable. For a start, assistance to vulnerable groups may not be dependent upon this designation, but rather on the general circumstances in which they find themselves (eg poverty, natural disaster zone, area of conflict, etc). What makes calls for separate legal acknowledgment anything other than arbitrary? Is it even appropriate to enter into an inquiry about, and develop policy based on, whose livelihoods are more jeopardized, more at risk, within a group of people who all clearly have survival needs? This has consequences for the law as well. Because the nature of the inquiry shifts depending on what are thought to be the legal issues requiring redress.

Crucially, the focus in any analysis should be the nature of potential harm, not its cause. In a human rights analysis, whether the source of that harm is attributable to climate change or other socio-economic or environmental pressures is immaterial (and misplaces the focus of the inquiry);[7] what matters is the harm likely to be faced by the individual if removed. This is what Kälin describes as the 'returnability test', which emphasizes the 'prognosis' – whether it is safe to return – rather than the underlying motivations for movement. Such a test would be based on the 'permissibility, feasibility (factual possibility) and reasonableness of return'.[8]

One of the biggest drawbacks of much of the scholarship generated on 'climate migration' has been a tendency to treat climate-related movement as a single phenomenon that can be discussed in a general way. As Walter Kälin has highlighted, a number of very different scenarios are captured within this rubric, and it is only through examining them separately, with attention to their distinctive and common features, that any meaningful policy or normative frameworks can be developed.[9]

[7] An exception would be if the harm could be directly linked back to the action or negligence of the home State, in which case it could be a juridically relevant fact.
[8] Kälin, *op cit*, 98.
[9] *Ibid*.

For example, people may move as a result of slow-onset processes taking place over many years (eg 'sinking islands'), or because a government relocates them out of harm's way; or because there is a sudden disaster that necessitates movement. What is clear is that each involves different kinds of pressures and impacts, which will affect the time, speed and size of movement, and the nature of solutions. A sudden disaster, such as a cyclone, may precipitate very fast flight, but it may only be temporary, and assistance in the form of humanitarian disaster relief may be a sufficient response. By contrast, climate change impacts that take place over a much longer period, through erosion, salinity and so on, may ultimately necessitate the relocation of a whole population to another country. In such cases, the planned, long-term relocation of those people must be negotiated with particular States or through an international burden-sharing agreement.[10]

While an overarching framework is helpful for identifying the range of climate impacts on human movement, the commonality of climate change as a driver is an insufficient rationale for grouping together a disparate array of displacement scenarios and proceeding to discuss policy responses in generic terms. A one-size-fits-all model simply will not work, Indeed, considerable conceptual confusion has arisen because of a lack of rigour and/or awareness in employing consistent terminology to describe those who move. As Barnett argues, we have in fact lost meaning because so much of the discussion lacks a real geo-social-political context.[11] This is problematic for the development of law and policy, because it risks being inappropriate and inaccurately targeted if it does not reflect understandings about the differences in nature, timeframe, distance, scale and permanence of potential movement.

Localized or regional responses may be better able to respond to the particular needs of the affected population in determining who should move, when, in what fashion, and with what outcome. Staggered migration, circular migration, or the promise of a place to migrate to should it become necessary might be welcome measures that could appeal both to host and affected communities alike.[12] Furthermore, by contrast to many other triggers of displacement, the slow onset of some climate change impacts, such as rising sea levels, provides a rare opportunity to *plan* for responses, rather than relying on a remedial instrument in the case of spontaneous (and desperate) flight.

D Overarching normative principles to guide deliberations

International protection frameworks, underscored by refugee and human rights law, provide important benchmarks for assessing needs and responses. They provide an existing body of rules

[10] The former President of the Australian Human Rights Commission, John von Doussa, regarded a burden-sharing treaty as a possible way forward: see 'Climate Change and Human Rights: A Tragedy in the Making' (20 August 2008) http://www.humanrights.gov.au/human_rights/climate_change/index.html (accessed 8 December 2008). The failure of this principle in addressing the plight of the world's refugees does not augur well, however, for this as a solution.

[11] John Barnett and Michael Webber, 'Migration as Adaptation: Opportunities and Limits' in McAdam (ed), *op cit*.

[12] This is the preferred approach of the government of Kiribati, for example. See eg author interview with President Anote Tong (Kiribati, 12 May 2009); comments of Kiribati's Foreign Secretary, Tessie Lambourne cited in Lisa Goering, 'Kiribati Officials Plan for "Practical and Rational" Exodus from Atolls' (*Reuters AlertNet*, 9 December 2009) <http://www.trust.org/alertnet/news/kiribati-officials-plan-for-practical-and-rational-exodus-from-atolls/> accessed 14 January 2011.

and principles to guide and inform policymaking, with identifiable rights-bearers and duty-bearers. They highlight issues that might be obscured by a purely environmental or economic analysis, and help to articulate claims about access, adaptation and balance.

In addition to ensuring that particular human rights are safeguarded, it is important that policies are underscored by broader humanitarian norms such as the principle of humanity and dignity. As the International Law Commission has noted in the context of protection from disasters, the principle of humanity is 'the cornerstone for the protection of persons in international law since it place[s] the affected person at the centre of the relief process and recognize[s] the importance of his or her rights and needs.'[13] Similarly, human dignity is 'a principle underlying all human rights'[14] which should guide legal and policy outcomes. When a person contemplates moving away from the impacts of climate change, the first question s/he will ask is 'where can I go?'. But the second question will be 'how will I be treated when I get there?'. It is imperative that human rights principles are brought to bear not only on issues relating to entry and admission, but also on the subsequent treatment and status of migrants in the host State.

E Conclusion and policy options

Legal and policy responses must involve a combination of strategies, rather than an either/or approach. In other words, they are not mutually exclusive. For example, migration options should be explored for pre-emptive movement, but this should not rule out a parallel humanitarian response for rapid-onset disasters or for people facing slow-onset change who are unable or unwilling to migrate. Guiding principles may be a preliminary step towards a binding legal instrument. A range of options should be utilized which are country/region-specific and attuned to their particular needs.

[13] Report of the International Law Commission, 62nd session (3 May–4 June and 5 July–6 August 2010), UN Doc A/65/10, para 310.
[14] 'Protection of Persons in the Event of Disasters: Statement of the Chairman of the Drafting Committee' (ILC, 20 July 2010) 7.